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No. 634

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1958 TERM

BERNICE SHEPTUR,
Petitioner,

v.

THE PROCTOR & GAMBLE DISTRIBUTING COMPANY,
an Ohio Corporation,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT

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SUBJECT INDEX

	Page
REASONS FOR DENIAL OF WRIT	1-5
I. The Decision of the United States Court of Appeals for the Sixth Circuit Should Not be Reviewed Because Petitioner's Counsel Contended in the Trial and on Appeal That State Law Should Control the Determination of the Sufficiency of the Evidence to Present a Question of Fact for the Jury	1-3
II. The Decision of the United States Court of Appeals, No Matter What Law Controls Should Not be Reviewed Because Petitioner Has Not Shown That She Was Prejudiced in Any Way	3-5
CONCLUSION	5

TABLE OF CASES

Baltimore & Ohio R.R. Co. vs. Whitacre, 242 U.S. 169	4
Cooper vs. Brown, 126 Fed. 2d, 874 (3rd Circuit, 1942)	2
Drucker vs. Manhattan Railway, 106 N.Y. 157	2
Erie R. R. Co. vs. Welsh, 242 U.S. 303	4
Gillis, Administratrix of Gillis vs. New York, Haven & Hartford Railroad Company, 249 U.S. 515	4
Gulf M. & O.R. Co. vs. Fruend, 183 Fed. 2d, 1005, 21 ALR 2d., 729 (8th Circuit, 1950)	2
Hussner vs. Brooklyn Railroad, 114 N.Y. 433	2
Lahr vs. Metropolitan Elevated Railway, 104 N.Y. 268, 294	2
New York Elevated Railroad vs. Fifth National Bank, 135 U.S. 432	2
Patton vs. Texas & Pacific Railway Company, 179 U.S. 658	3
Shaw vs. Stone, 1 Cush. 228, 243	2
Sullivan vs. Iron Silver Mining Company, 143 U.S. 431	3

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REASONS FOR DENYING THE WRIT

I.

The Decision of the United States Court of Appeals for the Sixth Circuit Should Not be Reviewed Because Petitioner's Counsel Contended in the Trial and on Appeal That State Law Should Control the Determination of the Sufficiency of the Evidence to Present a Question of Fact for the Jury.

Petitioner asks this Court to review the decision of the Court of Appeals on the basis that the Court of Ap-

peals decided specifically that Michigan Law was controlling in determining the sufficiency of the evidence. Petitioner now claims that the Circuit Court of Appeals for the Sixth Circuit was wrong in so holding.

We respectfully refer this Honorable Court to the following taken from Petitioner's Brief and Appendix filed in the United States Court of Appeals for the Sixth Circuit:

> "It is, of course, clear that the sufficiency of the evidence is a matter of substantive law and is governed by state law. *Cooper vs. Brown*, 126 Fed. 2d, 874 (3rd Circuit, 1942); *Gulf M. & O.R. Co. vs. Fruend*, 183 Fed. 2d, 1005, 21 ALR 2d, 729, (8th Circuit, 1950)" (Pages 14-15 of Brief and Appendix for Appellant).

Petitioner is now estopped from claiming Federal Law rather than State Law should control when in both the trial and Appellant Courts, Petitioner took exactly the opposite position.

In *New York Elevated Railroad vs. Fifth National Bank*, 135 United States Reports, 432, in discussing a similar situation, this Honorable Court said at page 441 of the opinion:

> "But we are relieved from the necessity of laying down a general rule on the subject, because in this case it clearly appears that the defendant procured or acquiesced in the rulings under which the trial was conducted, and thereby waived the right to object to them. *Lahr vs. Metropolitan Elevated Railway*, 104 N.Y. 268, 294; *Drucker vs. Manhattan Railway*, 106 N.Y 157; *Hussner vs. Brooklyn Railroad*, 114 N.Y. 433; *Shaw vs. Stone*, 1 Cush. 228, 243."

Therefore, since Petitioner has contended until now that Michigan Law was controlling in determining the

sufficiency of the evidence, she should now be estopped from asking this Court to grant a Writ of Certiorari to review the matter.

II.

The Decision of the United States Court of Appeals, No Matter What Law Controls Should Not be Reviewed Because Petitioner Has Not Shown That She Was Prejudiced in Any Way.

Regardless of whether Michigan Law or Federal Law is controlling, the Petition for Writ of Certiorari should be denied because the Petitioner has not shown that she was prejudiced by the Trial Court's decision or the opinion of the Circuit Court of Appeals. There has been no showing that the Federal Rule in diversity cases would have helped Petitioner anymore than Michigan Law concerning the sufficiency of evidence to create a question of fact.

A decision of a Circuit Court of Appeals should not be reviewed by Writ of Certiorari unless substantial and prejudicial error appears in the record. This is true even though the Appellate Court assigns a wrong reason for a correct decision. *Sullivan vs. Iron Silver Mining Company*, 143 U.S. 431.

In discussing the propriety of a directed verdict in the case of *Patton vs. Texas and Pacific Railway Company*, 179 U.S. 658, this Honorable Court said at page 660:

> "Hence it is that seldom an appellate court reverses the action of a trial court in declining to give a peremptory instruction for a verdict one way or the other. At the same time, the judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting

questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility. He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of one party and he so rules by instructions to that effect, an Appellate Court will pay large respect to his judgment. And if such judgment is approved by the proper appellate court, this court, when called upon to review the proceedings in both courts, will rightfully be much influenced by their concurrent opinions."

In *Gillis, Administratrix of Gillis vs. New York, Haven & Hartford Railroad Company*, 249 U.S. Page 515, this Honorable Court said at page 516:

"That case repeated the established principle that that when the evidence justifies it, it is competent for a court to direct a verdict for defendant. The principle is not attacked by plaintiff. The contention, however, is that the courts below, one of which tried the case, were wrong in their estimate of the evidence and that plaintiff was entitled to the judgment of the jury upon it. We are unable to yield to the contention. Nor do we think it necessary to give a review of the evidence. It will be found in the opinion of the court and we have verified its correctness. The case turns, therefore, upon an appreciation of the testimony and admissible inferences therefrom, and even if the conclusions of the courts were more disputable we should have to refer to them. *Baltimore & Ohio R. R. Co. vs. Whitacre*, 242 U.S. 169; *Erie R. R. Co. vs. Welsh*, 242 U.S. 303."

Petitioner relies on cases under the Federal Employers Liability Act, which by inference she admits have no application to the present diversity of citizenship case.

Therefore, because Petitioner has failed to show any prejudice by the trial court's direction of verdict and the Sixth Circuit Court of Appeals' affirmance of the verdict, the Petition for Writ of Certiorari should be denied.

CONCLUSION

Respondent respectfully submits that this Court should deny the Petition for Writ of Certiorari to review this cause for the following reasons:

1. That because Petitioner relied on State Law in the trial court and Circuit Court of Appeals in determining the sufficiency of evidence she is now estopped from claiming that Federal Law should apply.

2. That Petitioner has failed to show that she was prejudiced by the holdings of the trial court and the Circuit Court of Appeals.

3. That Petitioner has failed to show that the results would have been different if Federal Law had been applied.

Respectfully submitted,

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Dated: February 3, 1959.